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Malayan Banking Bhd v Saujana Pesona Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2453–10 OF 2012
ZAHARAH IBRAHIM, ABDUL AZIZ ABDUL RAHIM AND VARGHESE GEORGE JJCA
2 MARCH 2016

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Banking — Banks and banking business — Loan facility — Limitation — Loan facility reduced — Borrower and guarantor commenced suit against bank for breach of contract for reducing amount of loan facility — Borrower defaulted in payment of facility — Bank filed suit claiming for sums due and owing — Whether bank's claim time-barred under provisions of Sarawak Limitation Ordinance

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The appellant sued the first respondent as the principal borrower and the second and third respondent as the guarantor over a facility granted by the appellant to the first respondent. The grant of the facility was evidenced by the appellant's letter of offer dated 23 November 1996 and the revolving fixed facility agreement dated 14 January 1997. The original amount offered and approved under the facility was RM750,000 and the facility was guaranteed by the second and third respondents by a letter of guarantee dated 14 January 1997. On 18 December 1997, the appellant revised the facility from RM750,000 to RM350,000 in accordance with the terms of the letter of offer, revolving fixed facility agreement and prevailing market conditions. The respondents commenced suit against the appellant for breach of contract, inter alia, in reducing the amount approved under the facility. Judgment was entered for the respondent. On appeal to the Court of Appeal by the appellant, the Court of Appeal reversed the decision. The principal amount of the facility that was granted and disbursed to the first respondent, and guaranteed by the second and third respondents was only RM350,000. The first respondent defaulted in the payment of the facility, and despite repeated demands, the first respondent refused or failed and or neglected to pay such monies due and payable to the appellant. The appellant lifted a sum of RM207,400.32 from the first respondent's fixed deposit account to set off the amount due and payable by the first respondent to the appellant under the facility agreement. Even with the set-off, the first respondent was still owing the appellant a sum of RM621,122.81. The issued demand letters to all the respondents giving them 14 days' notice to pay the amount due and owing. The respondents failed or neglected to make any payment. The appellant then filed a suit at the High Court claiming the sum of RM621,122.81 under the facility which the appellant said was due and owing to the appellant. The respondents filed a

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conditional appearance as well as an application to strike out the appellant's claim on the ground that limitation had set in. The first respondent contended that the appellant's first letter of demand was dated 27 February 2002. The judicial commissioner allowed the respondents' application. The appellant appealed to this court and the appeal was allowed. The case was then remitted back to the High Court for hearing. The issue that arose was whether the appellant's claim was time-barred under the provisions of the Sarawak Limitation Ordinance.

Held, allowing the appeal in part:

(1) The first notice of demand that was sent to the first respondent was dated 27 February 2002. The averments in the affidavits by the appellant and the respondents supported this conclusion. Therefore, it appeared that at the expiry of that notice, the appellant would have a cause of action against the first respondent. Counting the period from 27 February 2002, the limitation period of six years would have set in on 26 February 2008. The appellant's suit against the respondents in this appeal was filed on 15 October 2009. Clearly therefore in so far as the first respondent was concerned, the appellant's action was time-barred (see para 19).

(2) The first respondent's letter of 29 April 2003 was not an instruction to uplift the fixed deposit. Reading the letter carefully, the first respondent was under a misapprehension that having commenced the action in earlier against the appellant for alleged breach of the facility agreement the first respondent could accept the breach and no longer wished to be bound by the agreement. Uplifting of the fixed deposit and the amount lifted used to set off against the outstanding amount owing was not an act of repayment by the first respondent but an exercise of the appellant's right under the facility agreement (see para 21).

(3) The said letter could not be an acknowledgement because an acknowledgement must be done in language that is unequivocal of a subsisting debt still subsisting. The first respondent had written the said letter under the misapprehension that it no longer wanted to be bound by the facility agreement because of the alleged breach by the appellant. Moreover the first paragraph of the said letter indicated that the first respondent was responding to the appellant's letter dated 14 January 1997 with regard, probably, to the deposit. The argument by the first respondent on this issue was well supported by high authorities (see para 25).

[Bahasa Malaysia summary

Perayu menyaman responden pertama sebagai peminjam utama dan responden kedua dan ketiga sebagai penjamin atas kemudahan yang diberikan oleh perayu kepada responden pertama. Pemberian kemudahan adalah bukti

oleh surat tawaran perayu bertarikh 23 November 1996 dan perjanjian kemudahan tetap pusingan bertarikh 14 Januari 1997. Jumlah asal yang ditawarkan dan diluluskan di bawah kemudahan adalah RM750,000 dan kemudahan dijamin oleh responden kedua dan ketiga melalui surat jaminan bertarikh 14 Januari 1997. Pada 18 Januari 1997, perayu menyemak semula kemudahan dari RM750,000 kepada RM350,000 mengikut terma surat tawaran, perjanjian kemudahan tetap pusingan dan keadaan pasaran semasa. Responden memulakan guaman terhadap perayu untuk pelanggaran kontrak, antara lain, dalam mengurangkan jumlah yang diluluskan di bawah kemudahan. Penghakiman telah dimasukkan untuk responden. Pada rayuan di Mahkamah Rayuan oleh perayu, Mahkamah Rayuan mengakaskan keputusan itu. Jumlah prinsipal kemudahan telah diberikan dan dibayar kepada responden pertama, dan dijamin oleh responden kedua dan ketiga hanyalah RM350,000. Responden pertama ingkar dalam pembayaran kemudahan, dan walaupun dituntut beberapa kali, responden pertama enggan atau gagal membayar dan atau mengabaikan untuk membayar wang tertunggak dan harus dibayar kepada perayu. Perayu menaikkan jumlah sebanyak RM207,400.32 daripada deposit tetap responden pertama untuk *set off* jumlah tertunggak dan harus dibayar oleh responden pertama kepada perayu di bawah perjanjian kemudahan. Walaupun dengan *set off*, responden pertama masih berhutang dengan perayu sejumlah RM621,122.81. Surat tuntutan yang dikeluarkan kepada kesemua responden memberikan mereka notis 14 hari untuk membayar jumlah tertunggak dan terhutang. Responden gagal atau mengabaikan untuk membuat apa-apa bayaran. Perayu kemudiannya memfailkan saman di Mahkamah Tinggi menuntut jumlah RM621,122.81 di bawah kemudahan yang mana perayu katakan tertunggak dan terhutang kepada perayu. Responden memfailkan kehadiran bersyarat dan juga permohonan untuk membatalkan tuntutan perayu atas alasan had masa telah berlaku. Responden pertama menghujahkan bahawa surat tuntutan pertama perayu bertarikh 27 Februari 2002. Pesuruhjaya kehakiman membenarkan rayuan responden. Perayu merayu ke mahkamah ini dan rayuan telah dibenarkan. Kes itu kemudiannya diremitkan semula ke Mahkamah Tinggi untuk didengar. Isu yang timbul adalah sama ada permohonan perayu terhalang oleh had masa di bawa peruntukan Ordinan Had Masa Sarawak.

Diputuskan, membenarkan sebahagian rayuan:

(1) Notis tuntutan pertama telah dihantar kepada responden pertama bertarikh 27 Februari 2002. Penegasan dalam afidavit oleh perayu dan responden menyokong kesimpulan ini. Oleh itu, ia kelihatan bahawa apabila tamat tempoh notis itu, perayu akan mempunyai kuasa tindakan terhadap responden pertama. Mengira tempoh dari 27 Februari 2002, tempoh had enam tahun akan tetapkan pada 26 Februari 2008. Saman perayu terhadap responden dalam rayuan ini telah difailkan pada 15 Oktober 2009. Dengan itu jelas setakat berkenaan responden

pertama, tindakan perayu dihalang oleh had masa (lihat perenggan 19).

(2) Surat responden pertama bertarikh 29 April 2003 bukanlah arahan untuk menaikkan deposit tetap. Membaca surat tersebut secara teliti, responden pertama adalah salah faham kerana telah memulakan tindakan awal terhadap perayu bagi pelanggaran perjanjian kemudahan didakwa, responden pertama dapat menerima pelanggaran dan tidak lagi mahu terikat dengan perjanjian. Menaikkan deposit tetap dan jumlah dinaikkan digunakan untuk *set off* terhadap jumlah tertunggak terhutang bukanlah tindakan pembayaran semula oleh responden pertama tetapi suatu pelaksanaan hak perayu di bawah perjanjian kemudahan (lihat perenggan 21).

(3) Surat tersebut tidak boleh menjadi satu pengakuan kerana pengakuan mesti dilakukan dalam bahasa yang tidak berbelah bahagi bagi sesuatu hutang yang masih wujud. Responden pertama telah menulis surat tersebut atas salah faham bahawa ia tidak lagi mahu terikat di bawah perjanjian kemudahan kerana pelanggaran oleh perayu. Tambahan lagi perenggan pertama surat tersebut menunjukkan bahawa responden pertama membalas surat perayu bertarikh 14 Januari 1997 berkaitan, kemungkinan, terhadap deposit. Hujahan oleh responden pertama terhadap isu ini disokong dengan baik oleh pihak berkuasa (lihat perenggan 25).]

Notes

For cases on banks and banking business in general, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2565–2788.

Cases referred to

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2011] 2 CLJ 269, FC (refd)

Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328; [2001] 2 CLJ 157, CA (refd)

Public Bank Bhd v Tan Sri Datuk Yacob Hitam & Anor [2011] 1 LNS 1097, HC (refd)

Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54; [1978] 1 LNS 234, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 14A, O 14A r 1, O 92 r 4

Sarawak Limitation Ordinance (Cap 49) s 19, 19(1), Schedule, Item 97

Appeal from: Suit No 22–223 of 2009-I (High Court, Kuching)

Chan Cheng San (Chan & Chan Advocates) for the appellant.
RJ Noel (RJ Noel Advocates) for the respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] This is the appellant's (plaintiff in the High Court) appeal against the decision of the learned judge in chambers allowing the respondents' application under O 14A of the Rule of the High Court 1980 and dismissing the appellant's suit. The only issue in this appeal is whether the appellant's claim against the respondents is time-barred.

[2] The learned judge held that the appellant's suit was time-barred against all the respondents. The learned judge found that the appellant's letter of demand was issued to the first respondent only on 27 February 2002 and deemed to have expired on 5 August 2008. The appellant's suit was filed against all the respondents on 15 October 2009.

[3] For the background to this appeal we re-produce the relevant passages in the ruling in chambers made by the learned judge on 29 August 2012 in allowing the respondents' summons in chambers application dated 6 June 2012 under O 14A of the RHC 1980 and dismissing the appellant's writ and statement of claim with cost of RM3,000. The relevant passages read:

> The plaintiff bank had offered and the 1st defendant had accepted a banking facility in the form of a revolving fixed facility for the sum of RM750,000 way back on the 23rd November, 1996. The 2nd and 3rd defendants are husband and wife respectively who set up the 1st defendant company and are guarantors to the said facility. After an initial drawdown of RM200,000, the plaintiff bank reduced the amount of facility to RM350,000 and refused to reinstate the original amount offered despite the defendant's appeal. This reduction has caused the 1st defendant's business to suffer. The defendants then took an action against the bank in Suit No 22–11–99-II claiming damages for breach of contract. After a full trial of the action, judgment was entered against the plaintiff bank on 6th July, 2009. That judgment was set aside on appeal by the Court of Appeal on 17th April 2012.
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> Meanwhile on 15th October, 2009 the plaintiff bank filed this action, just about three months after the judgment obtained against them in the earlier suit, for the 1st defendant's failure in servicing the monthly installments for the facility. After setting off a sum of RM207,400.32 being the fixed deposit in the 1st defendant's account, the amount outstanding as at 31st July, 2009 was RM621,122.81 and that was the amount claimed by the plaintiff bank in this action together with interest and cost.
>
> After service of the writ of summons and statement of claim, the defendants filed a conditional appearance as well as an application to strike out the plaintiff bank's claim on the ground that limitation has set in. This is because the plaintiff bank's first letter of demand was dated 22nd February, 2002. I heard that application and agreed that limitation has set in but the Court of Appeal reversed the said decision and ordered that the matter to go for trial. The defendants have since filed their statement of defence, again alleging that limitation has set in.

The defendants have now filed an Order 14A application for a question of law to be determined, ie whether the plaintiff's claim is time-barred under the provisions of the Sarawak Limitation Ordinance (Cap 49). In their affidavit and in their counsel's written submission before me, it is stated that my earlier decision on the striking out was reversed based on the Court of Appeal decision in *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 2 CLJ 789 which was submitted and relied on by the plaintiff bank's counsel at the appeal hearing. The Court of Appeal in the cited case held that the issue of limitation cannot be raised unless the statement of defence has been filed.

For the record, I did not have the benefit of *Tasja*'s case when I wrote my judgment on the striking out as my decision was made earlier, on 12th April, 2010 before the decision was reported. Mr RJ Noel for the defendants has therefore submitted that since they have filed their defence, the court can now rule on their defence on limitation.

The plaintiff's counsel did not dispute that the appeal on the striking out has been determined based on the decision in *Tasja*'s case. That being so and without any intention whatsoever of being disrespectful to the Court of Appeal's order remitting the case of trial, I agree with Mr R J Noel that I can consider this application of his clients new and that res judicata does not apply.

[4] In this case the appellant had sued the first respondent as the principal borrower and the second and third respondent as the guarantor over a facility granted by the appellant to the first respondent. The grant of the facility was evidenced by the appellant's letter of offer dated 23 November 1996 and the revolving fixed facility agreement dated 14 January 1997. Both documents are not in dispute. The original amount offered and approved under the facility was RM750,000.

[5] The facility was guaranteed by the second and third respondents by a letter of guarantee dated 14 January 1997.

[6] On 18 December 1997, the appellant revised the facility from RM750,000 to RM350,000 in accordance with the terms of the letter of offer, revolving fixed facility agreement and prevailing market conditions. Following on the reduction of the original amount of the facility the respondents commenced Suit No 22–11 of 1999-II against the appellant for breach of contract, inter alia, in reducing the amount approved under the facility. I was the trial judge in the suit and after full trial, on 6 July 2009, I entered judgment for the respondent. On appeal to the Court of Appeal by the appellant the Court of Appeal reversed my decision. Thus, resulting from the reversal of my decision by the Court of Appeal, the principal amount of the facility that was granted and disbursed to the first respondent, and guaranteed by the second and third respondent was only RM350,000.

[7] The first respondent defaulted in the payment of the facility, and despite repeated demands, the first respondent had refused or failed and or neglected to pay such monies due and payable to the appellant. On 27 June 2003, the appellant lifted a sum of RM207,400.32 from the first respondent's fixed deposit account to set-off the amount due and payable by the first respondent to the appellant under the facility agreement. Even with the set-off, the first respondent was still owing the appellant a sum of RM621,122.81 as at 31 July 2009.

[8] On 7 September 2009, the appellant instructed its solicitors to issue demand letters to all the respondents giving them 14 days' notice to pay the amount due and owing. The respondents failed or neglected to make any payment

[9] The appellant then, on 15 October 2009, filed Suit No 22–223 of 2009-I at Kuching High Court claiming the sum of RM621,122.81 under the facility which the appellant said was due and owing to the appellant as at 31 July 2009. The statement of claim was dated 14 October 2009.

[10] After service of the writ of summons and the statement of claim, the respondents filed a conditional appearance as well as an application to strike out the appellant's claim on the ground that limitation had set in. The first respondent contended that the appellant's first letter of demand was dated 27 February 2002. The application came before the learned Rhodzariah bt Bujang JC (as she then was). The learned judicial commissioner heard and allowed the respondents' application. The appellant appealed to this court and the appeal was allowed. It was held that the issue of limitation cannot be decided before the defence was filed. The case was then remitted back to the High Court for hearing.

[11] The respondents then filed their defence dated 11 May 2012 to the appellant's claim. The material averments in the respondents' statement of defence are in paras 13 and 16. These paragraphs are reproduced below:

Paragraph 13 of the defence reads:

> 13. The 1st Defendant denies that it had at any material time, defaulted in re-payment of the Revolving Fixed Facility. The 1st Defendant will say that at all material times it had strictly complied with the terms of the Letter of Offer read together with the Revolving Fixed Facility Agreement. The 1st Defendant will further say that the Plaintiff issued a Letter of demand on 27th February 2002 and thereafter filed the Writ and Statement of Claim in this action dated 15th October 2009 and 14th October 2009 respectively. The 1st Defendant had rightfully refused to comply with any purported demand for payment from the Plaintiff because there was no sum due and

payable to the Plaintiff. The 1st Defendant will say that the Plaintiff's claim is stale, time-barred and unsustainable. Paragraph 14 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

Paragraph 16 reads:

16. Save that the 1st, 2nd and 3rd Defendants have received the Letters of Demand dated 7th September, 2009, Paragraph 17 of the Statement of Claim is denied. The Defendants will say they have rightfully refused to make payment of the sum of RM621,122.81 as demanded or any part thereof.

[12] The appellant filed its reply to the defence on 24 May 2012. The appellant joined issue with the respondent's defence dated 11 May 2012. With regard to the issue of limitation, the appellant pleaded in its reply to the defence in paras 3–9 as follows:

3. In reply to paragraph 5 of the Defence, the Plaintiff will say that the Plaintiff's claim is not statute barred by the Sarawak Limitation Ordinance.

4. The Plaintiff will say that the payment by the 1st Defendant on 27.6.2003 was pursuant to the 1st Defendant's letter to the Plaintiff dated 29.4.2003 and the said payment revives the Plaintiff's claim against the 1st Defendant.

5. The Plaintiff will say that the 1st Defendant's letter dated 29.4.2003 was an acknowledgment of the debt owing to the Plaintiff, and the said acknowledgment revives the Plaintiff's claim against the 1st Defendant.

6. The Plaintiff will say that the payment by the 1st Defendant on 27.6.2003 of the sum of RM207,400.32 was made pursuant to the 1st Defendant's letter to the Plaintiff dated 29.4.2003, and therefore it is a payment by the 1st Defendant.

7. The Plaintiff will say that subsequent to the payment by the 1st Defendant on 27.6.2003, the Plaintiff issued a fresh Letter of Demand to the 1st Defendant on 18.8.2005, and the time should run from that fresh Letter of Demand.

8. The Plaintiff will say that the Plaintiff first issued Letters of Demand to the 2nd and 3rd Defendants on 19.8.2005, which is well within the six (6) years period of Limitation, therefore the Plaintiff's claim against the 2nd and 3rd Defendants cannot be time barred.

9. The Plaintiff will say that the Letter of Demand dated 27.2.2002 to the 1st Defendant only has been superseded by the subsequent Letter of Demand to the 1st Defendant dated 18.8.2005.

On the above pleadings, the appellant contended that its action was not time-barred.

[13] On 6 June 2012, the respondents filed an application under O 14A r 1 and O 92 r 4 of the RHC 1980 for the determination of the appellant's suit without full trial on the following question:

> Whether the plaintiff's (ie the appellant) claim is time-barred under the provisions of the Sarawak Limitation Ordinance (Cap 49)

[14] The respondents' application was supported by an affidavit affirmed by Tan Swee Lee, the second respondent on 5 June 2012. At para 35 of the second respondent's affidavit in support it was averred as follows:

> 35. I know that, by a letter dated 27th February 2002, the Plaintiff through its advocates wrote a letter of demand to the 1st Defendant herein alleging that the 1st Defendant had failed to pay them various sums of money

[15] It will be noticed that appellant solicitor's letter of demand to the first respondent was dated 27 February 2002 demanding payment for the sum of RM474,435.85. But the letter of demand to the guarantors — the second and third respondents — was dated 18 August 2005 and 7 September 2009. The letters were exhibited in the affidavit.

[16] The appellant filed three affidavits in opposition to the respondents' application under O 14A. For the purpose of this appeal we need to refer only to the appellant's first affidavit in opposition affirmed by Siva Prakasam a/l A Subramaniam who was then the head of the appellant's loan management centre. The relevant averments in Siva Prakasam's affidavit are found in paras 12 and 13 and they read:

> 12. On 18.8.2005, the Plaintiff issued fresh letters of Demand to the 1st Defendant, and to the 2nd and 3rd Defendants on 19.8.2005 demanding for the sum of RM425,483.19, being the amount owing to the Plaintiff by the Defendants as at 30.7.2005. Copies of the letters of demand dated 18.8.2005 and 19.8.2005 are exhibited hereto and marked SP4, SP5 and SP6 respectively.
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> 13. In reply to paragraph 34 of Tan's Affidavit, I verily believe that the letter of demand by the Plaintiff's advocates to the 1st Defendant dated 27.2.2002 has been superseded by the letter of demand dated 18.8.2005 to the 1st Defendant because of the set off payment credited to the 1st Defendant's account amounting to RM207,400.32 bringing the balance due to the Plaintiff then to RM335,327.61.

[17] From the above averments it is obvious that two notices of demand were issued to the first respondent. The first notice was dated 27 February 2002 and the second notice was dated 18 August 2005. The second notice was also sent to the second and third respondents, the guarantors. In respect of the first notice of demand of 27 February 2002 to the first respondent, Siva Prakasam

explained in his affidavit in para 13 above that he believed the notice had been superseded by the second notice dated 18 August 2005. Technically he may be correct. But for the purpose of determination of the limitation issue the first notice of demand to the first respondent is material. This is because the appellant's cause of action against the first respondent for the recovery of the outstanding amount owing under the facility agreement arises at the expiry of that notice. It is not in dispute that the appellant did not file action against any of the respondents to enforce the 27 February 2002 notice at the end of the notice period.

[18] In this case, the appellant is trying to recover monies lent under a facility agreement. The relevant provision in the Sarawak Limitation Ordinance (Cap 49) is Item 97 to the Schedule to the Ordinance. Under this item the limitation period is six years. In relation to the notice of demand, learned counsel for the appellant submitted that as evidenced by the averments in the appellant's affidavits in opposition to the respondent application, there were several notices of demand issued to the respondents after 2002. The latest notice was dated 18 August 2005. However in *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328; [2001] 2 CLJ 157, this court comprising of Shaik Daud Ismail JCA, Mokhtar Sidin JCA and Mohd Saari Yusoff JCA held that:

> ... the liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as the guarantors ... It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action.

[19] Having scrutinised the material dates in this case, we are in agreement with the learned judge's finding that the first notice of demand that was sent to the first respondent was dated 27 February 2002. The averments in the affidavits by the appellant and the respondents (which we have referred to above) support this conclusion. Therefore it appears that at the expiry of that notice the appellant would have a cause of action against the first respondent. Counting the period from this date ie 27 February 2002, the limitation period of six years would have set in on 26 February 2008. The appellant's suit against the respondents in this appeal was filed on 15 October 2009. Clearly therefore in so far as the first respondent is concerned the appellant's action is time-barred.

[20] However the appellant contends that the cause of action was revived when the first respondent made payment of RM207,400.32 when the first respondent 'instructed' the appellant on 29 April 2003 to uplift the fixed deposit belonging to the first respondent. The 'instruction' allegedly came in

the form of a letter of the same date signed by the second respondent as director of the first respondent. The letter is reproduced below:

April 29, 2003

The Assistant Branch Manager
Mayban Finance Berhad
Kuching Branch

BY HAND

Lot 21–211, Jalan Satok
93400 Kuching

Dear Sir,

RE: DIVERSIFY YOUR MONEY

I refer to your letter dated 11.1.1997 in respect of the Al-Mudharabah Investment Account Certificate of RM150,000.

As we have commenced an action against the Bank in respect of the Loan Facilities which was granted to the Company and is pending hearing before the High Court in Suit No 22–11–99-II, I write to inform the Company is no longer interested in continuing with the Loan Facilities. Instead, we return herewith the Photostat Copy Fixed Deposit Certificate (original certificate held by Bank) with the instruction to set off the said sum of RM150,000 plus all interest accrued against the loan facilities granted to the company.

The return of the Fixed Deposit would not prejudice our rights and or claims which our Company has against your bank.

Yours faithfully,
Saujana Pesona Sdn Bhd
.....sgd.....
TAN SWEE LEE

Acknowledge Received By

_____sgd_____
COP and SIGN

[21] In our view the first respondent's letter of 29 April 2003 is not an instruction to uplift the fixed deposit. Reading the letter carefully we think that the first respondent was under a misapprehension that having commenced the action in earlier Suit No 22–11 of 1999-II against the appellant for alleged breach of the facility agreement the first respondent could accept the breach and no longer wished to be bound by the agreement. In this respect with agree with the trial judge that uplifting of the fixed deposit and the amount lifted used to set off against the outstanding amount owing was not an act of repayment by the first respondent but an exercise of the appellant's right under the facility agreement.

[22] The appellant also argued that the first respondent's letter is an acknowledgment of the debt within the meaning of s 19 of the Sarawak

Limitation Ordinance. Section 19(1) of the Ordinance provides that:

> If, before the expiration of the period prescribed for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

[23] The explanation to s 19 provides inter alia that for the purpose of the section '... an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, ...'.

[24] Learned counsel for the appellant argued that if there is no outstanding due to the appellant, why would the respondent instruct the appellant to set-off the fixed deposit?

[25] In this regard we prefer the argument by learned counsel for the respondent that the said letter cannot be an acknowledgment because an acknowledgment must be done in language that is unequivocal of a subsisting debt still subsisting. We have said earlier that the first respondent had written the said letter under the misapprehension that it no longer wanted to be bound by the facility agreement because of the alleged breach by the appellant. Moreover the first paragraph of the said letter indicates that the first respondent was responding to the appellant's letter dated 14 January 1997 with regard, probably, to the deposit. In our view the argument by the first respondent on this issue is well supported by high authorities. In *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54; [1978] 1 LNS 234 (FC), Suffian LP speaking for the Federal Court, in dismissing the appeal and after referring to several English authorities on the point, accepted the principle that an acknowledgment must be unequivocal admission of a subsisting debt. In his closing paragraph of his judgment in that case the learned Suffian LP said:

> The letter in question, in our view, is not an unequivocal admission of a debt subsisting at the time of the acknowledgment, but one that might subsist in the future, contingent or there being on there being any balance left, due from the fund to the plaintiff, after the bank's losses had been made good. On the date of the letter the extent of the bank's loss was not known and consequently the exact amount of any balance due from the defendants to the plaintiffs was not known either; and the exact ascertainment of this amount was wholly dependent on the separate agreement of the defendants.

[26] The decision in *Wee Tiang Teng* was followed by this court in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2011] 2 CLJ 269.

[27] With regard to the case against the second and third respondents as guarantors, the legal position is slightly different. The contract of guarantee in this case (as evidenced by the letter of guarantee for loan — exh TSL3) is 'on demand guarantee and a continuing guarantee'. Mohd Ariff MD Yusof J (as he then was) in *Public Bank Bhd v Tan Sri Datuk Yacob Hitam & Anor* [2011] 1 LNS 1097 held, after going through the authorities on the point, that in the case of a demand guarantee, a cause of action against a guarantor will only accrue after demand is made against a guarantor. In the instant appeal, there is undisputed evidence in the affidavits by the appellant that on 18 August 2005 notice of demand was sent to all the respondents including the second and third respondents as guarantors. The second respondent had conceded in his affidavit that he and the third respondent had received the demand notice dated 18 May 2005. Therefore the appellant had a cause of action against the second and third respondents as guarantors from that date or at the latest after the expiry of the period by which the guarantors must comply with the notice to make payment. The action against the second and third respondents was commenced on 15 October 2009 — about four years after the date of the demand notice. Clearly therefore the appellant's action against the second and third respondents was filed within the six year limitation period.

[28] For the above reasons we are unanimous in allowing the appeal in part. The High Court's decision in relation to the guarantors is set aside and the question of whether the appellant's claim against the second and third respondents as guarantors is time-barred under the provisions of the Sarawak Limitation Ordinance (Cap 49) must be answered in the negative. The appeal against the decision of the High Court in relation to the first respondent as the principal borrower is dismissed and that decision is affirmed.

[29] Parties to bear their own costs and the deposit is to be refunded. We so order.

Appeal allowed in part.

Reported by Afiq Mohamad